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Jurisdiction as Sovereignty over Occupied Palestine: The Case of Khan-al-Ahmar

Abstract

In the context of prolonged occupation, it has long been argued that the Israeli Supreme Court, in High Court of Justice formation, is facilitating the entrenchment of a permanent regime of legalised control by moving away from a model of exception to ordinary civilian jurisdiction over the West Bank. This was recently demonstrated in the Khan-al-Ahmar case, in which a group of settlers petitioned the ISC/HCI demanding the execution of a pending Israeli demolition order over a school in a Bedouin village in Palestine. The court sided with the army, deferring to a political solution for the transfer of the entire Bedouin community elsewhere. Drawing on existing scholarship and the author's first-hand impressions of the final hearing, this article interprets the Khan-al-Ahmar case as an illustration of how the exceptional military nature of the occupation has shifted to a permanent regime of legalised control overseen by an ordinary civilian court.*

* Please note: in this phrase, 'legalised' describes compliance to procedural standards set out in existing laws and related judicial practices; it does not refer to elements of substantive justice of said laws and judicial practices.

Keywords:

Palestine, West Bank, jurisdiction, Israeli Supreme Court/High Court of Justice, occupation

Introduction

While exiting the courtroom after the final Khan-al-Ahmar hearing of 23rd April 2014, the legal counsel representing the Bedouins before the Israeli Supreme Court in High Court of Justice formation (ISC/H CJ) described the entire trial as 'Kafkaesque'. The judges did not give him the opportunity to speak on behalf of his Palestinian clients, whose tiny community east of Jerusalem was caught in a legal battle between the Israeli state and Israeli settlers over the timings of the demolition of the village school to facilitate settlement expansion. And although the court did not order the execution of the demolition as the settlers had demanded, the Khan-al-Ahmar judgment did not constitute a victory for Palestinians. Instead, by deferring to a political solution, the ISC/H CJ reaffirmed its full integration within the Israeli institutional framework and, consequently, its inherent inability to adjudicate fairly over matters involving Palestinian rights in Palestinian territory.

In *Kfar Adumim Community Settlement v Minister of Defense*, settler representatives of Kfar Adumim petitioned the Israeli Ministry of Defence demanding the execution of a pending demolition order over the 'tyre school' in the adjacent Khan-al-Ahmar Bedouin village (UNRWA, 2009). The settlers argued that the makeshift school buildings had not received the proper Israeli planning permission; moreover, its location fell within the proposed expansion area of Kfar Adumim, granting them standing in the case. The trial was conducted as an ordinary judicial review between Israeli citizens (representatives of Kfar Adumim) and the Israeli

state (listed as 'respondents 1-3': Minister of Defense, Commander of the Central Defence, IDF and Israeli Civil Administration). The Bedouin community whose school was the object of the dispute was listed in the trial documents as a secondary group of respondents ('respondents 4-6': Suleiman Ali Arara, Muhammad Szliman Alkushran and Ibrahim Hamis Jahalin). The judges ultimately sided with the state and did not enforce the demolition order, deferring instead to an Israeli plan to relocate the entire Khan-al-Ahmar community to a different location in the West Bank. So in effect, the ISC/H CJ reaffirmed that the fate of the school as well as the future of this Bedouin community fell squarely within the sovereign remit of the Israeli state – be it the army, the courts, or the Knesset – regardless of the fact these people were Palestinians living in Palestine.

The Khan-al-Ahmar case is not exceptional. It illustrates the ISC/H CJ's role in legitimising Israeli control over Palestine, favouring Israeli interests over Palestinian rights, a critique proposed for decades (e.g. Shehadeh, 1985; Shamir, 1990; Sultany, 2014; Weill, 2015). David Kretzmer (2002: 2-3) has suggested that 'the main function of the Court has been to legitimize the government's actions in the Territories', both when the ISC/H CJ sides with the state authorities, and when it opposes them (also Shamir, 1990); as such, it plays a crucial role in maintaining and upholding the occupation (Kretzmer, 2002; Al-Haq, 2010; Harpaz and Shany, 2010: 515) alongside military courts (Dinstein, 2009: 132; Arai-Takahasi, 2009: 145-166).

The framework that underpins the Khan-al-Ahmar case is the ISC/H CJ's judicial review over the actions of state agents, which from the early days of the

occupation has extended outside Israeli sovereign territory to cover military activities in Palestine (Kretzmer, 2002: 1; 19-21). The ISC/HCJ's jurisprudence has given Palestinians the possibility to petition against actions carried out by the Israeli military or under the aegis of the military (Shamir, 1990: 785; Dinstein, 2009: 25-26, Weill, 2015: 2). But the court has also extended this right to Israelis in Palestine: based on a widely criticised interpretation of Art 43 of the Hague Regulations, it considers Israeli settlers part of the 'local population' (Kretzmer, 2002: 65), distorting the purpose of international humanitarian law (IHL) and disregarding the illegality of transferring parts of the occupying power's population to occupied territories (Art 49(6) Fourth Geneva Convention (GCIV)).

Reflecting on the significance of the Khan-al-Ahmar case, this article considers how the ISC/HCJ's far-reaching and unimpeded jurisdiction over the West Bank and Palestinians, teamed with its institutional relationship with the Israeli state, is constructing Israeli sovereignty over Palestine in the language of civilian law. More generally, this research explores how cases like Khan-al-Ahmar contribute to transforming a military occupation into quasi-annexation, to the detriment of individual Palestinian rights as well as Palestinian territorial integrity. Drawing loosely on the notion of 'transformative occupation' furthered by Nehal Bhuta (2005) and Adam Roberts (2006), this paper describes the Israeli control over Palestine a 'permanent regime of legalised control',¹ in contrast to the exceptional temporary nature of military occupation, which is now paradoxically in its fiftieth

¹ In this phrase, 'legalised' describes compliance to procedural standards set out in existing laws and related judicial practices; it does not refer to elements of substantive justice of said laws and judicial practices

year. The notion of a permanent regime of legalised control is also distinct from both the concept of extraterritorial jurisdiction and from sovereignty, although it shares many of its features and effects. The Khan-al-Ahmar judgment provides a recent example of how the ISC/HCI implements the permanent regime of legalised control over the West Bank, demonstrating how formal proceedings and law facilitate the Israeli grip over Palestine, without having to openly resort to armed force.

The Khan-al-Ahmar case provides an illustration of how law, and in particular trials, helps mask political abuse in how Israel deals with Palestinian matters. The legalistic nature of the Israeli occupation was widely discussed at the 1988 Al-Haq conference in Jerusalem (Playfair, 1992: 205). More recent socio-legal scholarship illustrates the strategic uses of Israeli trials to gain political advantage over Palestinians, as recently demonstrated by Allo (2016), and the structural challenges of legal resistance in this context (Weizman, 2016). Using legal procedure for political ends is a widespread phenomenon (Kirchheimer, 1961) not exclusive to the context of Israel/Palestine. Indeed, judicial rituals – including high court trials – mask deeper social functions of law: official procedures carry the ‘potential to dehumanize persons through the use of conceptual legal masks’, camouflaging the ‘human significance’ and gravity of certain acts through the illusion that ‘legal reasoning will remain on a level of neutral abstraction’ (Weyrauch, 1978: 699-670). In other words, using legal proceedings to bolster the Israeli grip over Palestine is a more sophisticated tool of control and oppression than the use of military might.

The first part of the article will show how uncertain boundaries and the current political geography have enabled Israel – and consequently the ISC/H CJ – to enjoy a far-reaching jurisdiction over the West Bank. The second part will demonstrate how international laws applicable to the West Bank and their interpretation and implementation by Israel have created the conditions for a permanent regime of legalised control that has long outgrown the limits and exceptionality of temporary occupation. The third and final part will illustrate how the case of Khan-al-Ahmar typifies the notion of permanent regime of legalised control, by discussing some specific aspects of the ISC/H CJ extraterritorial jurisdiction in the West Bank, that encompass Bedouin communities and all matters involving settlement activity. More generally, this research seeks to widen the debate beyond the legitimising role of the ISC/H CJ in the military occupation of Palestine. Instead, this article interprets the permanent regime of legalised control in place as a route through which extraterritorial jurisdiction of a civilian court can construct sovereignty and facilitate annexation – above and beyond what can be envisaged through the simple notion of military occupation.

A Regime of Soft Boundaries

For the purpose of this study, the 1967 Green Line provides an indication as to what can be understood as Israel and as occupied Palestine, though neither party has formally accepted these borders. Yet crucially, the reality on the ground does not lend itself to a clear distinction between the two political entities. There are unanswered questions as to the Israeli political willingness to let go of the West

Bank; some scholars have alluded to the hope of part of the Israeli population to absorb the Palestinian territories, following the East Jerusalem model of unilateral annexation (Ratner, 2005: 700). Kretzmer (2002: 19) has summarised this ambiguity stating that 'over the years Israeli governments pursued policies aimed at integration of the Occupied Territories with Israel while refraining from formally annexing the West Bank'. International law, and in particular the laws of armed conflict, has been used to facilitate Israeli control over the West Bank, giving rise to a 'legal hypocrisy' (Kretzmer, 2013): the land is not regarded by Israel as occupied, yet its Palestinian inhabitants are subject to the law of occupation. The prolonged occupation coupled with a complex system of Israeli control over Palestinian lives and facilitation of Israeli settler activity – in addition to security arrangements that give Israeli forces access to the whole of Palestine, and the 'customs envelope' that renders Palestine economically dependant on Israel (Del Sarto, 2015: 6) – problematizes the border question further.

The notion of 'borderlands' introduced by Raffaella Del Sarto (2015: 6-7) helps uncouple 'political and functional borders' from 'the boundaries of political communities across Israel-Palestine'. Her understanding of a system of open and closed borders 'performing different functions' seems to describe the practical realities of living in the West Bank. In this context, 'Israel enjoys a monopoly over where and how to mark and enforce the boundaries between itself and Palestinians' (Tawil-Souri, 2012: 173) and can enforce a regime of soft boundaries based on identity cards and residency permits that limit the freedom of movement

of Palestinians into, out of and within the West Bank. The exercise of the ISC/HCJ's jurisdiction over the West Bank is evidently facilitated by these soft boundaries.

Building on the 1993 Oslo Agreements, in *Oslo II* (1995) (Bauck and Omer, 2013) Palestine (excluding Gaza) was carved up into three areas based on the proposed division of powers and responsibilities to be shared between Israeli and Palestinian authorities (Art XI(3)). Area A, consisting of the main cities and townships in the West Bank, falls under Palestinian security and public order jurisdiction (Art XIII(1)), as well as for administrative and civil matters. In Area B Israel has 'the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism' (Art XIII(2)(a)), while the Palestinian Police' is 'responsible for handling public order incidents in which only Palestinians are involved' (Art XIII(2)(b)(2)), in close coordination with Israeli authorities. Non-security matters fall under Palestinian jurisdiction.

The residual Area C, comprising over 60% of the territory of the West Bank (UN-OCHA, 2014a: 1), has never been transferred to the Palestinian institutions as set out in *Oslo II* (Art XI(3)(c)) and related talks. As such, it remains under complete Israeli control for both security and civil matters, including law enforcement, planning and construction, which affect Palestinians, as well as Israelis living in settlements located in Area C and international aid agencies. According to UN-OCHA figures approximately 300,000 Palestinians live in Area C (UN-OCHA, 2014a), but they have to contend with two powerful Israeli interests. These include the so-called 'firing zones' and military areas (i.e. areas designated by the Israeli

army for training purposes (Diakonia, 2015), affecting around 6,200 Palestinian residents), and over 130 settlements and other outposts in the West Bank and East Jerusalem in which Israelis (UN-OCHA, 2014a: 1) live in settlements considered illegal under international law (Diakonia, 2014) (the illegality of settlements was established in the ICJ Wall Case, paragraph 120). While no exact figures for Israeli settlers in the West Bank are available, UN-OCHA (2014a) reports a conservative figure of 341,000, while the Yesha Council (2016), the 'umbrella governing organization of the Jewish communities of Judea and Samaria' (the biblical names for the West Bank), reports that 'at the end of 2015, the number of Israeli residents of Judea & Samaria reached 400,000 (not including another 210,000 Israelis living in Jerusalem's post-1967 neighborhoods)', raising the numbers to over half a million.

UN-OCHA has stated that 'most of Area C has been allocated for the benefit of Israeli settlements, which receive preferential treatment at the expense of Palestinian communities' (2014a). This is substantially the same position held by many Palestinian and Israeli human rights NGOs such as Al-Haq (2016) and B'Tselem (2013), as well as I-NGOs (HRW, 2010; Diakonia, 2013). In essence, the Israeli authorities administer the West Bank in their own national interest, regardless of Palestinian rights and status as protected persons clearly set out in international law (Art 27-34 and 47-78 GCIV, confirmed in Wall Case, paragraph 101). According to previous studies on the ISC/HCI jurisprudence involving the West Bank (Weill, 2015, Sultany, 2014, Kretzmer, 2002, Harpaz and Shany, 2010), the Israeli judiciary has substantially contributed to the situation. More generally,

observers outside law have spoken of 'ethnocratic expansionism' by Israel over Palestine and Palestinians (Yiftachel, 2006: 3-9). In this context, a paradoxical duality emerges as the Israeli authorities are intent on presenting their system as democratic and at the same time on enshrining ethno-national superiority of Jewish-Israeli citizens, including settlers, over Palestinians and Palestinian Israeli citizens, anywhere between the river Jordan and the Mediterranean sea. This hierarchy is especially visible in 'Area C', where Israeli law and practice has set out a hierarchical two-tier approach to governing Palestinians and Israelis.

Prior to the *Oslo II* arrangements that designated the three areas, it had been argued that Israel conducts a meticulous administration of the West Bank and its Palestinian residents by citing security justifications. At the 1988 Al-Haq conference in Jerusalem Richard Falk and Burns H. Weston (1992: 136-139) argued that:

Many of the legally dubious policies and practices pursued by Israel exceed the legitimate reach of military necessity and therefore may be associated more with suppressing Palestinian resistance to Israeli annexationist programmes (e.g. the establishment of settlements populated by Israeli Jews) than with safeguarding Israeli society.

Writing at the same time, Playfair (1992: 223-224) echoed the concern that although 'the occupying power has the right to carry out many actions, including some which would otherwise be in violation of international law' to safeguard its security, those actions have come to embrace every aspect of Palestinian life. These considerations remain pertinent today, and can be contrasted with the

treatment of settlers in the West Bank. Israeli settlers enjoy preferential treatment as nationals of the occupying power, namely through application of domestic civilian Israeli law extraterritorially to them, while Palestinians in the same territory are subject to military law. Moreover, as Weill (2015: 13) has remarked, the 'needs of the settlers have been legally translated as a security issue', which results in strengthening their claims before the ISC/HCI.

From Occupation to a Permanent Regime of Legalised Control

The ICJ has confirmed that Palestine – including the West Bank in its entirety – is considered under military occupation, and as such is governed by the Hague Convention and Regulations of 1907, as well as GCIV, as widely discussed in the literature (Imseis, 2003; Imseis, 2005; Kretzmer, 2005). The Wall Case also extended human rights obligations (including the ICCPR) to Israeli actions in Palestine, alongside the IHL duties of the occupying power. Yet the laws of military occupation that set out a temporary and exceptional regime of control over an occupied territory and population (Roberts, 1984; Greenwood, 1992; Sassòli, 2005; Benvenisti, 2012) become inadequate in the context of a prolonged and normalised situation of control (Roberts, 1990; Falk, 1989).

The classic view that 'occupation does not transfer sovereignty' but only authority to govern temporarily presents occupation and annexation as distinct and 'mutually exclusive' legal concepts (Pellet, 1992: 174-175). This dichotomy has been convincingly rejected by Martti Koskenniemi (2008: 32-35), in favour of a 'sliding scale' of governance, in which an extended occupation carries features of both

sovereignty and war. Moreover, some forms of occupation, termed *occupatio bellica* by Nehal Bhuta (2005: 725-726), more closely resemble an 'intermediate status between invasion and conquest'. In this type of 'transformative occupation' an occupying power extends its exercise of temporary, factual (and militarily-backed) authority, regulated under IHL, to the enjoyment of an ostensible sovereign power over an occupied territory:

Like a sovereign dictatorship, transformative occupation exceeds the legal order that authorizes its provisional assumption of control. (Bhuta, 2005: 738)

As the temporary military nature of the occupation fades, and a new order backed by permanent civilian judicial oversight is put in place by the occupying power to maintain control over the occupied territories and population, the overall picture begins to change. The permanent regime of legalised control enjoyed by Israel in the West Bank is an example of this.

Israeli administrative powers over the West Bank are exercised firstly by the Coordinator of Government Activities in the Territories Unit (COGAT, 2015b), part of the general staff of the Ministry of Defence, in 'coordination and conjunction with the Prime Minister's Office, other government ministries, the security forces and the IDF General Staff'. A branch of COGAT (2015a) is the Civil Administration in Judea and Samaria (i.e. West Bank or Palestine), an integral part of the Israeli Defence Forces (IDF). It describes its main tasks as 'the civil and security coordination and liaison vis-à-vis the Palestinian entities', exercising authority over 'zoning, construction and infrastructure' and liaising with the 'international

community on issues relating to humanitarian aid and the promotion of various initiatives in Judea and Samaria’.

Two parallel legal regimes have been created for the two groups. Israeli settlers fall under ordinary Israeli civilian justice (Kretzmer, 2013; Gordon, 2008). In contrast, the administration of justice for Palestinians is through the Israeli military courts, in what has been described as a ‘process of judicial domination’ of the West Bank (Weill, 2007; Hajjar, 2005). In addition to the military courts and the residual Palestinian administration of justice over Palestinian-only disputes in Areas A and B, overall judicial oversight in the West Bank is exercised by the ISC/HCJ, a function described as ‘a central feature of Israel’s legal and political control over these territories’ (Kretzmer, 2002: 1). The ISC/HCJ’s ‘power to determine whether or not certain actions of the occupant serve the interest of the local population or are at any rate beneficial to such population’ has been long criticised (Cassese, 1992: 439-440). Already at the 1988 Al-Haq conference in Jerusalem Antonio Cassese (1992) had argued that the court was not in a strong position ‘for determining whether or not certain measures of the occupant meet the needs of the local population’, because in a ‘democratic country’, ‘such a determination would naturally fall on the various representative bodies of the communities concerned’. Thus in hearing petitions that affect Palestinian rights and needs, the ISC/HCJ is unlikely to adjudicate fairly and impartially.

Under administrative law, the ISC/HCJ exercises judicial review over the other branches of the Israeli state, and enjoys powers ‘in matters in which [the HCJ]

considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal' (Israel Ministry of Foreign Affairs, 2015). As such, pursuant to the overarching administrative supervision of the executive's actions, including the military, and thus COGAT, the jurisdiction of ISC/HCJ judges extends to all Israeli activities in Palestine, access to which is entirely within the powers of Israel. Consequently, the ISC/HCJ enjoys *de facto* oversight over all of Palestine, although this is felt more incisively in Area C. Furthermore, the length of the occupation, the separation wall (Kattan, 2007), the growing numbers of Israeli settlers in the West Bank and the ISC/HCJ interpretations of IHL have deeply transformed the original context in which the laws of military occupation operate.

The rules of IHL classify the local civilian population living under military occupation as protected persons, whom international law treats as individuals requiring additional safeguards in light of their precarious and vulnerable condition (Art 27-34 and 47-78 GCIV). In the West Bank, Palestinians are protected persons under IHL. Crucially, the GCIV excludes civilian nationals of the occupying power from these protections (Art 49(6)): Israeli settlers in the West Bank are thus clearly excluded. Yet as recalled by Shehadeh (1992: 165) Military Order 1213 (1987) granted the status of 'local residents' to settlers, an interpretation that had found favour in the ISC/HCJ jurisprudence since the 1970s (Kretzmer, 2002: 64-65). This military order ignores the prohibition of transfer of the occupying power's own civilian population into occupied territory set out clearly in the GCIV, listed as a grave breach in Additional Protocol I (API) (Art 85(4)(a)), subsequently classified as

a war crime in the ICC Statute (Art 8(2)(b)(viii)), considered part of customary IHL (ICRC, 2006: Rule 130)). The ISC/HCI, however, has generally endorsed this position held by the military and the state, resulting in the paradoxical protection of Israeli settlers through the Hague Regulations (Art 43) (Weill, 2014: 32-33) which distorts the purpose of IHL. Israeli settlers are thus protected on two effective bases, firstly, as members of the local population understood in IHL terms (i.e. as 'protected persons'), and secondly, as civilian nationals of the occupying power, enjoying rights and status of Israeli citizens extraterritorially. Yet notably, the same body of laws is used to restrict Palestinian freedoms, to the extent that the ISC/HCI has interpreted their welfare as protected persons in a consistently narrow sense for quite some time (Playfair, 1992: 218-220).

Kretzmer (2012) has provided a detailed analysis of ISC/HCI jurisprudence on the 'military or security needs' of the military commander that reflect the interests of the occupying power and its citizens. His interpretation seems consistent with the findings of the award-winning documentary 'The Law in these Parts' by Ra'anan Alexandrowicz (2011), in which senior members of the Israeli military and civilian judiciary talk frankly about their role as lawmakers and law enforcers administering the occupation. Among those interviewed, Ilan Katz (colonel, retired), Deputy Military Advocate General (2000-2003) states candidly:

I think that, thanks to the Court, many of the military's actions are legitimised [...] [this] gives the action a legal seal of approval and makes it possible to keep doing it under the restrictions set by the Supreme Court. (Alexandrowicz, 2011: 56'51")

This quote highlights the special relationship between the ISC/HCJ and the military. And throughout the documentary, the extent to which this institutional complicity compromises the neutrality and impartiality of the ISC/HCJ in adjudicating over Palestinian issues remains a lingering question.

A striking example of the continuum between the executive, the military and the ISC/HCJ is provided by the enforcement of the Israeli zoning and planning regime in Area C (Diakonia, 2013). The system in place provides extremely limited consultation opportunities for Palestinians affected, but it is open to settler committees as noted in studies since the 1980s (Rishmawi, 1992: 292; Home, 2003). Under this regime, if a structure does not have the proper Israeli permit, it is likely to be given a demolition order, often justified on security grounds. Historically the requisition of Palestinian land supported by ISC/HCJ judgments has been used as a means to facilitate settler expansion (with some exceptions) (Playfair, 1992: 223-229). For a long time security justifications have facilitated the preservation and the expansion of Israeli hold over the West Bank, regardless of the IHL protections afforded to the local Palestinian communities (Playfair, 1992: 229-230). This strategy has not changed over the past three decades, as the Khan-al-Ahmar case demonstrates.

An international fact-finding mission established by the UN Human Rights Council (UN-HRC, 2013a and 2013b) monitors the correlation between settlement expansion and the violation of international law and Palestinian human rights. Key concerns include the Israeli plans to relocate Bedouin communities to make room

for settlement expansion (UN-OCHA, 2014b), as shown in the Khan-al-Ahmar judgment, and the route of the separation wall that juts into the West Bank to ensure the majority of settlements remain connected to Israel proper (UN-OCHA, 2014c; B'Tselem, 2011) regardless of the impact on Palestinian communities (as shown in the recent Battir and Cremisan cases at the ISC/HCJ). This illustrates how the entrenchment of a permanent regime of legalised control enables Israel to dispose of the West Bank and its Palestinian inhabitants as it pleases. The following section considers some of the themes emerging from the Khan-al-Ahmar decision and how they demonstrate the creeping annexationist effects of the permanent regime of legalised control.

The Jurisdiction over Khan-al-Ahmar

The exercise and modalities of jurisdictional oversight by the ISC/HCJ over the West Bank emerging from the case of Khan-al-Ahmar typify the entrenchment of Israeli power over Palestinians. The dispute focused on the lack of planning permission for the Bedouin school, the basis of the demolition order. According to the petitioning Kfar Adumim settlers, the failure to demolish the school violated their private property, as they planned to expand their settlement to the Khan-al-Ahmar site. In its response, the Ministry of Defence, with whom the ISC/HCJ eventually sided, stated instead that the school fell on Israeli state land, which was not privately owned by the settlement and dismissed claims that Kfar Adumim had any property rights over that area. There was no mention of the rights of the Bedouin community to live in their village and keep their community school. The

Bedouins were marginalised in the proceedings and silenced in the final hearing. Their fate was decided in a foreign court, in a foreign language, in a dispute they were not directly party to.

As Khan-al-Ahmar falls within Area C of the West Bank, it is subject to the Israeli planning regime (Diakonia, 2013). All building activity as well as structural maintenance is regulated de facto by Israel on the basis of its interpretations of IHL and local laws applicable at the start of the occupation (including British mandate planning rules of the 1940s and Jordanian laws of the 1960s). In 1967, when the Israeli Military Commander obtained civil and military powers in the West Bank, all planning activities were centralised under the Israeli military and thus the executive (Diakonia, 2013: 38, citing in particular Military Order 418 (1971)).

With regards to the specific geopolitics of the location, Khan-al-Ahmar is adjacent to the expanding Israeli settlement of Kfar Adumim, in the area referred to as 'E1' by the Israeli planning authorities (B'Tselem, 2012). If completed, E1 will form a ring of Israeli settlements around Palestinian east Jerusalem, consequently enclosing the Palestinian Jerusalemites (on both sides of the separation wall) within Israeli settlements. The demolition orders in Khan-al-Ahmar are to be understood in the broader context of the Israeli plan to relocate Bedouin communities out of the area east of Jerusalem to make way for settlement expansion. If the plan to remove the Bedouins from their current location to other parts of the West Bank goes ahead, it will give rise to concerns forcible transfer of

civilians (UN-OCHA, 2014b: 1), prohibited by the GCIV (Art 49 and 147) and the ICC Statute (Art 7(1)(d) – crime against humanity).

The ISC/HCJ's decision not to uphold the demolition order, but defer to the political decision of the Knesset, gives the Khan-al-Ahmar community temporary respite. Yet the court's conduct in this case reveals how the permanent regime of legalised control subjects the fate of the affected Bedouin communities to Israeli judicial and political decisions. Palestinian voices (be they institutions or community representatives) remain structurally marginalised in all Israeli contexts. The West Bank Bedouins in Area C thus find themselves governed by lawmakers they cannot elect and judged by a foreign court system willing to defer to its own domestic politics. In this context, the ISC/HCJ entrenches the permanent regime of legalised control over the West Bank, exercising almost unimpeded extraterritorial jurisdiction over the Bedouins in Area C, as if fully within Israeli sovereignty.

Extraterritorial Jurisdiction

The laws of armed conflict, Israeli military orders and courts, and the judicial oversight exercised by the ISC/HCJ have provided the political and practical basis for a form of Israeli extraterritorial jurisdiction over the West Bank that is inching closer to *de facto* sovereignty, described in this article as a permanent regime of legalised control. To the casual observer, the quiet judicial oversight of the ISC/HCJ in the West Bank does not match the aggression associated with military convoys and armed confrontations that come to mind when thinking of military occupation or unilateral annexation by force. Yet the court's role is no less controversial: by

affirming its jurisdiction over matters involving Palestinians, it is imposing a more subtle form of Israeli control. Radical commentators may even term it 'sovereignty creep' – which is harder to detect. In the absence of clearly demarcated borders between Palestine and Israel, the ISC/HCJ helps ensure permanent Israeli presence through its civil jurisdiction, exercised over most aspects of Palestinian life by virtue of living under military occupation. When key Israeli national interests are at stake, such as in the greater Jerusalem area, the possibility of deference to parliamentary politics in judicial review proceedings demonstrate that the judiciary is willing to follow the Knesset and the executive line on what to do in Palestine.

Khan-al-Ahmar is situated in the E1 area to the east of Jerusalem, within close proximity to the Kfar Adumim settlement, nestled between the Ma'ale Adumim settlement and a major satellite industrial area (UN-OCHA, 2011). All of these locations fall east of the Green Line and of the Israeli-declared Jerusalem borders in Area C. The Bedouin village flanks Highway 1, an Israeli-built motorway that connects the Jordan Valley (in Palestine) to East Jerusalem and onwards to Tel Aviv, cutting across the Palestinian Territories and enabling unimpeded access to Israeli-registered vehicles between the Mediterranean and the Dead Sea. The visual impact of the place is striking: a handful of makeshift huts, some animal pens, a school and a few other non-permanent structures partly provided by international donors (as part of their humanitarian efforts), sliced by a fast 3-lane motorway serving two hilltop settlements that tower over Khan-al-Ahmar. The tiny Bedouin community seems out of place next to these mammoth modern

structures, almost waiting to disappear under the might of its neighbours, whose demographic growth and energy consumption rise steadily.

A legal analysis of this picture brings this context into perspective: the settlements are considered illegal under international law (though Israel disputes this, as set out in the 2012 Levy Committee Report). Art 49 GCIV states that 'the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. The UN Human Rights Council (Resolution 19/17 (2012), among other UN documents) has stated clearly that Israeli settlements in the Palestinian territories are illegal, following the ICJ's analysis in the Wall Case (paragraph 120). Therefore, the ISC/HCJ's position giving effect to the alleged legal interests of the settlers over territory inhabited by Palestinian Bedouins in the West Bank demonstrates contempt of international law. That court, pursuant to its jurisdictional reach over the Palestinian Territories through IHL, can rely on two paradoxical ways to protect the political interests of the state of Israel – through settler presence – over Palestine. Firstly, its practice of including Israeli settlers within the categories of civilians gives them a 'legalised' presence within the Palestinian territories under the laws of military occupation – although this is based on a flawed Israeli interpretation of IHL (as discussed earlier). And secondly, granting administrative standing to settlers vis-à-vis the Israeli authorities renders the legal relationship between settlers and the Israeli state ordinary and equivalent to that of other Israeli citizens – although this relationship plays out outside the formal territorial sovereignty of Israel. The ISC/HCJ's approach fails to recognise that the territory in which settlers reside does not fall within the boundaries of the

state, nor that the settlements have been recognised as illegal under international law; yet its jurisdiction applies to them as if they were ordinary Israeli citizens living within full territorial sovereignty. The affirmation of Israeli interests in controlling that portion of land is more important than the welfare of Palestinian Bedouins living in villages in Area C protected under IHL.

In its wider context this case illustrates the extent of the entrenchment of Israeli control over Palestine and Palestinians through civilian means, transforming the nature of the occupation into a more permanent regime of legalised control, which is most visible in Area C of the West Bank. The ISC/HCJ's deference to politics, moreover, indicates its inextricable link to the other Israeli branches of power, enabling civilian officials – included elected representatives – in Israel to decide the fate of a community of Palestinian Bedouins whose voices are structurally marginalised in all Israeli institutions. If the judicial oversight of the West Bank falls within the jurisdiction of the ISC/HCJ, who in turn may defer to the Knesset, it could be concluded that Palestinians are disempowered subjects of a court, a parliament and an executive they cannot vote nor hold accountable in any effective manner. This raises important questions about the extent to which the extraterritorial jurisdiction of the ISC/HCJ in the West Bank, teamed with other non-military measures of control (albeit backed by military might), is transforming the occupation of Palestine into a reality that is inching towards annexation through civilian means.

Jurisdiction over Bedouins in the West Bank

In procedural terms, the Khan-al-Ahmar dispute is between a group of Israeli citizens, who happen to reside in the Kfar Adumim settlement deemed illegal under international law, and their State (Ministry of Defence and subsidiary offices). It looks like an ordinary administrative case in which the petitioners demand that the state respondents carry out a previously issued order (demolition order), the delay of which allegedly violates their rights or affects their legal interests (namely, the planned settlement expansion). In an ordinary setting within the jurisdictional boundaries of a given domestic court, this would be a fairly straightforward administrative trial. Yet the petitioners requested the ISC/HCI to judicially review the non-execution by the Israeli authorities of pending demolition orders over structures in a Palestinian Bedouin village in the West Bank – the property of non-Israelis, outside Israel.

The residents of Khan-al-Ahmar are members of the Jahalin tribe, a Bedouin group from the Negev desert (now within Israel) who fled to the West Bank after 1948 (Jamjoum, 2008/2009: 27; NRC, 2015). Many Negev Bedouins in the West Bank hold refugee status under international law, providing an additional layer of protection (UNRWA, 2013). Israeli plans to move these communities amount to transfer of civilians, described by one author 'an effective means to secure the fruits of conquest or aggression to the detriment of the civilian population' (Meindersma, 1994: 31). The transfer of Bedouins from one location to another in the West Bank raises serious questions around the issue of forced displacement, described as prohibited under customary IHL (ICRC, 2006: Rule 129). The Israeli authorities' attitudes towards the relocation of the Khan-al-Ahmar community

does not uphold the occupying power's obligations to protect the civilian population under its military control (GCIV Art 49, transfer, and Art 53, destruction of property). Additionally, the fact that the demolition order includes a school interferes with the protection of children as a particularly vulnerable group living under occupation (Art 50 GCIV).

In light of the applicable legal framework, in a public statement undersigned at a 'Bedouin Transfer Roundtable' in early 2015, Marco Sassòli and other international law scholars recalled that the Bedouin in Area C are protected persons living under occupation (Bedouin Transfer Roundtable, 2015: 1). Possible exceptions under IHL do not apply, because 'there are no ongoing hostilities to justify an exception to the prohibition of forced transfer' and the plan proposed by the Israelis is intended to be permanent. The remaining question is whether the transfer is forcible. Sassòli interprets this broadly, in a manner which is not 'restricted to physical force' and which takes into account 'the coercive circumstances in which the Bedouin live' that renders 'their true consent to the transfer' impossible (Bedouin Transfer Roundtable, 2015: 2). The legal experts at the roundtable concluded that a transfer would be forcible thus amounting to a grave breach of GCIV. The public statement also highlighted that the communities targeted by the relocation plan - including the Khan-al-Ahmar community - 'live on land earmarked for the E1 settlement construction plan and completion of the Wall about the Ma'ale Adummim settlement bloc' (Bedouin Transfer Roundtable, 2015: 1), which brings to the fore the link between displacement of the local population and emplacement of settlers already discussed.

The conclusions of that roundtable build on a previous expert opinion on the displacement of Bedouin communities, in which Théo Boutruche and Marco Sassòli (2014) provide a more detailed analysis of the transfer of the population of an occupied territory under API (Art 85(4)(a)). And while that expert opinion acknowledges that Israel is not a party to that treaty, it indicates API as 'the most recent codification of existing war crimes', also reflected in the ICC Statute (Art 8(2)(a)(vii) and Art 8(2)(b)(viii)). Boutrouche and Sassòli argue that the API 'clarifies the content of the grave breach of forcible transfer by explicitly criminalising this form of displacement within the occupied territory' and, importantly, links it to the occupying power's transfer of parts of its own population into the occupied territories. In the West Bank context, this refers to settlement expansion policies endorsed by the state of Israel, which is one of the main drivers for the displacement of the local communities.

The exercise of Israeli jurisdiction over Bedouin communities seems to include the power to order and implement transfer across the West Bank. The treatment of the Bedouins in the E1 area by Israeli authorities area reflects the treatment of the Negev Bedouin by the Israeli authorities (Falah, 1985; Falah, 1989; Shamir, 1996; Yiftachel, 2003; Nasasra, Richter-Devroe, Abu-Rabia-Queder and Ratcliffe, 2014). Both communities, in the Negev and in the West Bank, have been subject to multiple displacements and other acts that have altered their way of life. The main difference between these two situations is the legal regime applicable. In the Negev, the Bedouin are Israeli citizens with, in principle, the possibility of holding the state accountable for human rights violations through ordinary proceedings. In

the West Bank, an occupied territory under international law, the Bedouins are not citizens but enjoy the further protections of IHL, which includes the prohibition of forcible transfer of a protected civilian population living under occupation (Art 49 GCIV), exceptionally and temporarily derogable 'if the security of the population or imperative military reasons so demand'. The only way for these Bedouins to oppose an Israeli military order, for example a demolition order or the order to leave their homes and relocate, is to appeal to the ISC/HCJ. But as demonstrated in the Khan-al-Ahmar case, Palestinians are marginalised in those proceedings. Moreover, the prospect of realisation of human rights and IHL protections before that court becomes vain when the judges have the option to defer to the political establishment, as demonstrated in the Khan-al-Ahmar decision.

The Khan-al-Ahmar case illustrates how deeply Bedouin communities in the West Bank are vulnerable to Israeli politics to which the ISC/HCJ is willing to defer. It also shows the peripheral role in both the legal proceedings and political debates afforded to Palestinian Bedouins living in the West Bank. The absence of any genuine Israeli effort to ensure Palestinian participation and representation in matters pertaining to the community's survival in its present location was evidenced in the dynamics of the court proceedings as well as the political process, as if that portion of land and its inhabitants fell within the sovereignty of the Israeli parliament. This was made apparent in the ISC/HCJ's rejection of the petition and decision not to adjudicate on the grounds that the Israeli authorities were actively pursuing alternative solutions at political level to relocate the Bedouin community from Khan-al-Ahmar to Nweimeh (close to Jericho) (Hass, 2014), where more

adequate infrastructure and educational facilities would be provided. The Bedouins of the Khan-al-Ahmar case, however, enjoyed little political agency in this process, while being subject to the decisions of the Israeli judiciary and politicians.

Jurisdiction over Settlement Activity

The subject-matter of the dispute goes beyond the demolition of the tyre school in Khan-al-Ahmar and reaffirms the ISC/HCJ's jurisdiction over matters pertaining to settlements in the West Bank. Israeli settlers are not considered differently to Israeli citizens west of the Green Line by Israeli authorities. They are treated as ordinary citizens whose administrative standing vis-à-vis the state (and the ISC/HCJ) is equal to that of residents of Israel proper. In the political climate of official Israeli expansionism into the West Bank, demonstrated by the government's continued approval of settlements – described by the UN chief as 'provocative acts' (Ban Ki-Moon, 2016) – settler communities take on a strategic role of forerunners of territorial (re)conquest and control. The availability of a group of Jewish-heritage Israelis willing to settle on Palestinian land (for a variety of religious, ideological and economic reasons (Maidhof, 2014)) and live a relatively ordinary life reinforces the notion of Israeli ownership and entitlement. Their presence also shifts the role of the IDF in the West Bank from a purely offensive army to that of a defensive function in protecting settler life from the competing stance local Palestinian population. Consequently, the settlers become agents of the state in maintaining control over land, much like armies in traditional warfare, leaving the IDF to police the area.

The relationship between the IDF (and the Israeli authorities more generally) and the settlers has been sometimes described as 'symbiotic' (Peled, 2012: 87). While for the most part this seems assessment is realistic - Israel indeed provides economic subsidies, infrastructure (roads, connection to power and water grids), the full range of services (schools, hospitals) and military protection to West Bank settlements, as well as full citizenship rights to settlers - the relationship between settlers and the Israeli state is more complex, as evidenced in the rise of settler movements that oppose the state authority. Settler violence against Palestinians is growing dramatically, and even attacks towards the IDF are not infrequent (Byman and Sachs: 2012). The Khan-al-Ahmar case is to be understood in light of these growing tensions between groups of settlers and the state of Israel, played out extraterritorially in the West Bank. And while the dispute falls under administrative law, its substance reflects the internal political struggle between the Israeli authorities and a disgruntled group of citizens demanding greater support for settlement expansion. Accordingly, Palestinian Bedouin communities affected by this dispute are marginal to it.

The legitimate claims of Palestinians, whose land and resources have been taken and disposed of to enable and assist the settlements over the past decades, are not central to the Khan al-Ahmar case. As an organ of the Israeli state, the ISC/H CJ is unable to act as an impartial watchdog over the occupying power's administration of occupied land. Confirmation of the ISC/H CJ operating in close coordination with the Knesset, the IDF and other state bodies was made apparent in the minutes of the meeting of the Knesset Judea and Samaria Region Subcommittee of the

Foreign Affairs and Defence Committee (2014) discussing the so-called 'Illegal Palestinian construction in Arec C' on 27 April 2014. That document lists various representatives across the institutional spectrum - which included delegates from the HCJ - involved in the discussion of the official Israeli policy to remove Palestinian Bedouins and demolish structures in their communities in Area C. Officials in that Committee used the language of crime and punishment, revealing their fierce antagonism towards the UN and other international donors providing humanitarian aid (shelters, wells, toilets, electrical cables etc.) to Bedouin communities due to be relocated under Israeli plans.

More worryingly, ISC/H CJ judges who live in settlements have been involved in hearings about demolition orders in Bedouin villages, such as Justice Noam Sohlberg who 'gave the army a green light to expel an entire Palestinian village just happens to live in a nearby settlement' as reported by Dror Etkes (2015). And while his appointment in 2012 had been contested initially by critics of the Yesh Gvul movement who argued that residents of settlements could not serve as Supreme Court justices, given the possible conflict of interests arising in petitions involving the West Bank, the High Court rejected the claim (Zarchin, 2012). In its current formation, it seems unlikely that the ISC/H CJ would consider the illegality of settlements under international law problematic.

Returning to the Khan-al-Ahmar case, the final decision of April 2014 reaffirms the court's jurisdiction in the West Bank as well as the state of Israel's exercise of civilian sovereignty demonstrated through the Knesset's powers to draft and

approve master plans over Palestine and Palestinians, including the transfer of Bedouins. By deferring to a political solution, the ISC/HCJ endorsed the tacit understanding that the West Bank (and Area C in particular) falls within Israeli reach, to be administered and disposed of according to national interests, regardless of the wellbeing and rights of the local Palestinian civilian population set out in IHL. The realities of the prolonged occupation, cemented by over half a million Israeli settlers in the West Bank and the jurisdictional oversight of the ISC/HCJ, have consolidated a permanent regime of legalised control. Given that the vast majority of the West Bank does not fall under the jurisdiction of Palestinian laws and courts, the ISC/HCJ exercises virtually unimpeded jurisdiction. As such, the ISC/HCJ is assisting the aims of a form of transformative occupation, facilitating the creeping annexationist effects of the permanent regime of legalised control that further undermine the prospect of a viable independent Palestine state and the protection of Palestinian rights.

Conclusion

Over nearly half a century the context and effects of prolonged occupation have transformed the nature of Israeli military occupation over the West Bank into a permanent regime of legalised control. The far-reaching jurisdiction of the ISC/HCJ over Palestinian matters, as demonstrated in the Khan-al-Ahmar case, points to a situation of transformative occupation, which is radically altering the temporary, exceptional nature of Israeli military control. The judicial oversight of the ISC/HCJ in the West Bank and the possibility to defer to political solutions decided in the

Knesset – in the absence of defined borders – enables Israel to enjoy unimpeded authority over Palestine, and in particular in Area C of the West Bank, in a manner that suggests annexation creep.

This study widens the debate beyond the legitimising role of the ISC/H CJ in the military occupation of Palestine that dominates the critical literature. Instead, it interprets the permanent regime of legalised control as a route through which the extraterritorial jurisdiction of the ISC/H CJ as a civilian court can construct sovereignty and facilitate the annexation of the West Bank. Using the law and the expansionist jurisdiction of a supreme court, backed by military might, as a tool of territorial conquest is less likely to result in the same criticism that a military invasion would attract. Reflecting on the significance of the Khan-al-Ahmar judgment, this article considers how the ISC/H CJ's unimpeded jurisdiction over the West Bank and Palestinians, teamed with its institutional relationship with the Israeli state, contributes to the gradual shift of military occupation towards sovereignty, to the detriment of individual Palestinian rights as well as Palestinian territorial integrity.

The debate, therefore, has moved forward from lamenting that the Israeli Supreme Court in High Court of Justice formation legitimates the military occupation of Palestine. Instead, cases like Khan-al-Ahmar reveal an even more ambiguous role of the ISC/H CJ in transforming the occupation of Palestine into something more permanent, less overtly military and more civilised, treating Palestinian land as if it were Israeli, and dealing with Bedouins as if they were

disposable human beings who can be moved to make way for settlement expansion and territorial (re)conquest. By recognising that the law and its formal proceedings in this context conceal such abusive consequences, we are reminded to return to politics.

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